79-1258

Supreme Court, U. S.
FILED
FEB 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

CONFEDERATION OF IRANIAN STUDENTS
Petitioner

v.

BENJAMIN R. CIVILETTI
ATTORNEY GENERAL
OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

David Carliner
Charles Gordon
Carliner & Gordon
Attorneys for Petitioner
Suite 931
1511 K Street, N.W.
Washington, D.C. 20005

Of Counsel:
Bruce J. Ennis
American Civil Liberties Union
22 E. 40th Street
New York, New York

Index

Opinions Below ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 2

Statute Involved ---------- 3

Statement ---------- 4

Reasons for Granting the Writ ---------- 8

Conclusion ---------- 12

Appendix A

Opinion, Order, Judgment for Permanent Injunction ---------- A-1

Appendix B

Order Convening Special Merits Panel, Opinion, United States Court of Appeals for the District of Columbia Circuit ---------- B-1

Appendix C

Order, Opinion, Circuit Judge MacKinnon, Joint Statement of Chief Judge Wright, and of Circuit Judges Robinson, Wald and Mikva ------ C-1

Appendix D

Regulation Involved ---------- D-1

Appendix E

Raffik Abnous, et al. v. Benjamin R. Civiletti, United States District Court, Western District of Kentucky ---------- E-1

CITATIONS

Ahmed v. United States, 480 F.2d 531 (2d Cir. 1973) ---------- 10

Banco Nacionale de Cuba v. Farr Whitlock & Co., 307 F2d. 845, 861, 864-8 (1964) ---------- 10

Banco Nacionale de Cuba v. Farr Whitlock & Co., 383 F.2d 166-177, 183-85 (2d Cir 1967) cert denied 390 U.S. 956 (1968) ---------- 12

Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 402-3 (1964) ---------- 12

Barber v. Gonzales, 347 U.S. 637 (1954) ---------- 9

Barton v. Sentner, 353, U.S. 963 (1957) ---------- 9

Bonetti v. Rogers, 356 U.S. 691 (1958) ---------- 9

Brewster v. Gage, 287 U.S. 327, 336 (1929) ---------- 10

Ex Parte Endo, 323 U.S. 283 (1944) ---------- 13

Fiallo v. Bell, 430 U.S. 787 (1977) ---------- 10

Foley v. Connelie, 435 U.S. 291, 294 (1978) ---------- 8

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ---------- 9

Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963) ---------- 9

Gholamreza Narenji, et al. v. Benjamin Civiletti, et at., Civil Action No. 79-3189 ---------- 6

Giegow v. Eby, 239 U.S. (1915) ---------- 13

Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) ---------- 11

Hirabayashi v. United States 320 U.S. 81 (1943) ---------- 9

Iranian Students v. Civiletti, Par. (R.) with Raffik Abnous, et al. v. Civiletti, C.A. No. C 79-0623-L(A) ---- 5 (App. E)

Jaeger v. Simrany, 180 F.2d 650-653 (9th Cir. 1950) ---------- 9

Jordan v. DeGeorge, 341 U.S. 223 (1950) ---------- 9

Kent v. Dulles, 357 U.S. 116, 129 (1958) ---------- 7, 13

Korematsu v. United States, 323 U.S. 214 (1944) ---------- 9

Lennon v. INS, 527 F.2d 187, 193 (2d. Cir. 1975) ---------- 10

Mak v. INS, 435 F.2d 728, 730 (2d. Cir. 1978) ---------- 10

Mashi v. INS, 585 F.2d 1309, 1315-17 and n. 15 (5th Cir. 1978) ---------- 10

Mathews v. Diaz, 426 U.S. 67, 77-78 (1976) ---------- 10

Pilapil v. INS, 424 F.2d 611 (10th Cir.) cert denied 400 U.S. 908 (1970) ---------- 10

Rosenberg v. Fleuti, 374 U.S. 449 (1963) ---------- 9

Rowoldt v. Perfetto, 355 U.S. 115 (1957) ---------- 9

Sam Andrews Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972) ---------- 10

Saxbe v. Bustos, 419 U.S. 65 (1975)------ 10

The Paquete Habana, 175 U.S. 677 (1900) ---------- 12

United States v. Nixon, 418 U.S. 683 (1974) ---------- 13

United States v. Witkovich, 353 U.S. 194 (1957) ---------- 9

Woodby v. INS, 385 U.S.276 (1966) ---------- 9

Youngstown Sheet & Tube Co. v. Sawyer, 347 U.S. 579 (1952) ---------- 13

Constitution, Treaties, Statutes, and Regulations

United States Constitution
Fifth Amendment ---------- Passim

Covenant on Civil and Political Rights, Articles 2(1) and (26) 1968; 77 Dept. of State Bull. 578, Oct. 24, 1977 ---------- 12

American Convention on Human Rights (1969), Articles 1 and 27 (1) (2) 77 Dept. of State Bull. 28, July 4, 1977 ---------- 12

Immigration and Nationality Act
8 U.S.C. 1101 ---------- 3

Section 101 (a) 8 U.S.C. 1101(a) ----- 2, 3, 4, 9

Section 214 (a) 8 U.S.C. 1184(a) ----- 2, 3, 4, 9

8 U.S.C. 301 ---------- 3

8 C.F.R. 214.5 ---------- App. D, Passim

44 F.R. 65727 ---------- 4, 5

Miscellaneous

Digest of U.S. Practice of International Law (A. Rovine ed., 101-2, (1973) ----------

15 Weekly Comp. of Press. Doc. 2120, 2121-22 ---------- 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1979

NO.

Confederation of Iranian Students,

Petitioner

v.

Benjamin R. Civiletti,
Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CURCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed a judgment of the United States District Court declaring 8C.F.R. 214.5 unconstitutional.

OPINIONS BELOW

The District Court's opinion is unreported and is set forth at Appendix A. The opinion of the Court of Appeals is unreported and is set forth in Appendix B.

The order of the Court of Appeals en banc denying a suggestion for a rehearing en banc, the accompanying opinion by Circuit Judge MacKinnon for viting against the hearing, and the Joint Statement of Chief Judge Wright and Circuit Judges Robinson, Wald and Mikva in support of a rehearing en banc are unreported and are set forth at Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1979. A suggestion for rehearing en banc was denied on January 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Immigration & Nationality Act at 8 U.S.C. 1103(a) and at 8 U.S.C. 1184(a) authorize the Attorney General to promulgate 8 C.F.R. 214.5 prescribing selective treatment against Iranian nonimmigrant alien students in the United States solely upon the basis of their nationality?

(2) If so, whether 8 C.F.R. 214.5 is unconstitutional as a violation of the equal protection of the laws component of the due process clause of the 5th Amendment?

(3) If 8 C.F.R. 214.5 is not authorized by the Immigration and Nationality Act, whether the Executive may prescribe the regulation in its conduct of foreign affairs?

(4) Whether 8 C.F.R. 214.5 is in conflict with the principles of international law applicable to the United States?

STATUTE AND REGULATIONS INVOLVED

The statute, the Immigration and Nationality Act of 1952, 8 U.S.C. 1101, provides in pertinent part:

> "8 U.S.C. 1103(a). The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act..."

> "8 U.S.C. 1184(a). The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sums and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain

the status under which he was admitted, or maintain any status subsequently acquired under section 248, such alien will depart the United States."

---

8 C.F.R. 214.5 is set forth at Appendix D.

STATEMENT

On November 10, 1979, as part of what has been described as an element in the President's "carefully measured efforts to secure the safe release of the hostages"[1] being held at the United States Embassy in Tehran, the Attorney General was ordered by the President to "identify Iranian students in the United States who are not maintaining status and to take immediate steps to commence deportation proceedings against such persons." 44 F.R. 65727; 15 Weekly Comp. of Pres. Doc. 2120, 2121-22 (Nov. 15, 1979).

In response to the Presidential directive, on November 13th, 1979, the Attorney General prescribed 8 C.F.R. 214.5, citing as his statutory authority 8 U.S.C. 301, 1103(a) and 1184(a). The regulation required every alien "admitted as a F-1 or J-1 nonimmigrant student to attend a post secondary school...who is a native or citizen of Iran..." to report to representatives of the Immigration and Naturalization Service on or before December 14th, 1979 and to provide information as to residence and maintenance of nonimmigrant status and to produce, at the time of reporting, a passport, an arrival record in the United States, evidence relating to the payment of tuition fees, the number of course hours for which the student is enrolled, the fact that the student is in good standing, evidence of a current address in the United States, and "such other information as the Immigration and Naturalization Service may request in order to verify maintenance of status and residence."

1/ Statement by Deputy Secretary of State Warren Christopher, Nov. 30, 1979; Defendant's Ex. 7, R.

Failure to comply with these requirements was stated to be a violation of the condition of the nonimmigrant's stay in the United States and a basis for deportation. 8 C.F.R. 214.5, 44 F.R. 65727-28, November 14, 1979.

Simultaneously with the announcement of the newly-prescribed regulation, the INS initiated a special program directed solely at persons of Iranian nationality who had been lawfully admitted to the United States as nonimmigrant students with directives to all personnel (1) to interview each student attending post secondary schools, (2) to require submission by each Iranian student of a form, amended form I-538, specially prescribed for Iranian students, (3) to require each such student to identify all members of his or her family and to complete an additional form for each such family member, namely, form I-530; (4) to photograph each such student; (5) to provide other information not required of students who are citizens of countries other than Iran. In addition, all INS personnel were instructed to refuse to grant discretionary relief to nonimmigrant students of Iranian nationality, such as, the reinstatement of ninimmigrant students to lawful status and the withholding of deportation proceedings against Iranian students who had committed minor infractions of immigration regulations, such as being employed for a brief period of time or for a justifiable necessity without authorization, working in excess of 20 hours weekly, taking less than a full course load of studies, failing to apply for a timely extension of stay in the United States, changing schools without permission, and failing to attend school for a brief period of time, or, when deportation proceedings had been instituted, the grant of orders of voluntary departure to permit the completion of the school term or to permit graduation.[2]

2/ Cf. Complaint by Confederation of Iranian Students. Civiletti, Par. 10 (R.) with Raffik Abnous, et al. v. Civiletti, C.A. No. C 79-0623-L(A), U.S.D.C. of Ky., Agreement and Order by Court, App. E.

On November 27th, 1979, the petitioner, Confederation of Iranian Students, with national headquarters at Berkeley, California and with approximately 1,500 members each of whom is a citizen of Iran who was admitted to the United States as a nonimmigrant student, filed a complaint in the United States District Court for the District of Columbia seeking a judgment declaring that 8 C.F.R. 214.5 is beyond the statutory authority of the Attorney General and is unconstitutional and applying for an injunction to restrain the enforcement of the regulation.

The action below was consolidated with another cause of action, Gholamreza Narenji, et al. v. Benjamin Civiletti, et al., Civil Action No. 79-3189,which had been filed on November 21, 1979. Both of the cases were heard on the merits, upon consent of all parties, by the District Court on December 4, 1979.

On December 11, 1979, the United States District Court held that the regulation is unconstitutional and enjoined its enforcement. The District Court found that the "established canons of statutory interpretation applied to the immigration and deportation statutes, which require a strict construction so as not to 'trench on (an alien's) freedom beyond that which is required by the narrowest of several possible meanings of the words used' (citations omitted) do not support the conclusion that the defendant's discriminatory regulations are authorized by an express or implied congressional intent to allow deportation proceedings to be instituted on the basis of a national origin classification..." App. A-14

The Court also found "(i)n balancing the obviously weighty considerations involved in this case -- the Constitution's abhorrence of discrimination based on national origin, the need to protect against improper assertions of executive power in those areas where the Constitution has placed with the elected representatives of the Congress the primary responsibility for action, and the executive's need for freedom of action in international affairs -- we can only conclude that if a violation of equal protection inherent in the regulation at issue here is to be countenanced, 'it must be pursuant to the law making functions of the Congress,'" citing Kent v. Dulles, 357 U.S. 116, 129 (1958). App. A-18

The Government immediately filed a notice of appeal with an "Emergency Motion for Stay of Pending Appeal" upon the ground that this case "is one of major importance relating to the crisis in Iran." See Order of the District of Columbia Circuit below, dated December 14th, 1979. A "special merits panel" was drawn by the District of Columbia Circuit to hear the appeal with maximum expedition. That panel granted a stay of the District Court's injunction on December 20, 1979, heard oral argument on December 20, 1979, and reversed the District Court's decision on December 27, 1979. App. B-1, 2-11

In its opinion, a unanimous three-judge panel held that the challenged regulation is within the authority delegated by Congress under the Immigration and Nationality Act, that the power "to draw distinctions among nonimmigrant alien students on the basis of nationality" is granted by the statute to the Attorney General "so long as the action is reasonably related to the duties imposed upon him," and that "distinctions upon the basis of nationality may be drawn in the immigration field by the ...Executive" without offending due process or equal protection requirements if they are supported by a rational basis. App. B-5-6

The question whether the distinctions made as to Iranian nonimmigrant students have a rational basis, the Court of Appeals found, was met by an affidavit by the Attorney General that his regulation was issued "as an element of the language of diplomacy by which international courtesies are granted or withdrawn in response to actions by foreign countries." App. B-5-6

A suggestion by the petitioner, the Confederation of Iranian Students, for a rehearing en banc, filed on December 28th, 1979, was denied by the Court below in a split 5-4 per curiam decision on January 31, 1980, with an individual opinion by Circuit Judge MacKinnon stating his reasons for rejecting an en banc hearing and a Joint Statement by Chief Judge Wright and Circuit Judges Robinson, Mikva and Wald. In their statement, the dissenting judges, without reaching a "settled opinion on the propriety of the action attacked here" stated that "an executive decision to enforce an immigration statute selectively against a group of aliens because of the conduct of their parent country... imposes a novel and serious question implicating an equal protection component of Fifth Amendment due process..." that "the question requires close scrutiny, and our answer must reflect consideration of 'fine, and often difficult, questions of values'," citing Foley v. Connelie, 435 U.S. 291, 294 (1978). App. C-1, 10-12

REASONS FOR GRANTING THE WRIT

The Government has previously represented to the District of Columbia Circuit below when it was appealing an adverse decision by the District Court that this case "is one of major importance relating to the crisis in Iran." Order,United States Court of Appeals convening special merits panel, December 14, 1979. It is of no less importance now not only to the Iranian students who are adversely affected by the ruling of the Court of Appeals and its narrow 5-4 refusal to rehear the case, but as a precedental decision with possible future impact on all persons who have been admitted to the United States as nonimmigrants from all other countries, whatever their specific nationality.

As the four circuit judges of the Court below have observed in the statement of their reasons urging, in effect, that the decision of the three-judge panel be reconsidered, the "selective law enforcement" prescribed by 8 C.F.R. 214.5 "poses a novel and serious question... of exceptional importance...implicating an equal protection component of Fifth Amendment due process." App. C.

Not since Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944) has the Executive taken actions against persons in the United states selectively upon the basis of their national origin. Although the decisions there dealt with "distinctions between citizens solely because of their ancestry," the fact that those affected here are aliens does not dispose of their entitlement to equal protection of the laws. Mathews v. Diaz, 426 U.S. 67, 77-78 (1976).

Nor does the fact that they are nonimmigrant alien students with at most a statutory right to be in the United States temporarily resolve the central issues posed here, whether the Executive has been empowered by the Congress or by the Constitution under the authority to conduct foreign relations to prescribe discriminatory regulations against Iranian nonimmigrant students, and, if so, whether the regulation here is consonant both with requirements of equal protection of law and of the obligations imposed upon the United States by international law.

The reading by the lower court to the relevant provisions of the Immigrant and Nationality Act, 8 U.S.C. 1103(a) and 1184(a) has given a breadth of construction not previously conferred by this or any other court. The doctrine has been that deportation statutes are to be given a strict construction, a principle one would think would apply especially to the enforcement of deportation laws upon the selective basis of nationality. See Fong Haw Tan v. Phelan, 333 U.S. 6, 10(1948); Jordan v. DeGeorge, 341 U.S. 223 (1950); Barber v. Gonzales, 347 U.S. 637 (1954); United States v. Witkovich, 353 U.S. 194 (1957); Barton v. Sentner, 353 U.S. 963 (1957); Rowoldtv. Perfetto, 355 U.S. 115 (1957); Bonetti v. Rogers, 356 U.S. 691 (1958); Rosenberg v. Fleuti, 374 U.S. 449 (1963); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Woodby v. INS 385 U.S. 276 (1966). See also Jaeger v. Simrany,

180 F.2d 650-653 (9th Cir. 1950); Pilapil v. INS, 424 F.2d 611 (10th Cir.) cert. denied 400 U.S. 908 (1970); Sam Andrews Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972); Ahmed v. United States 480 F.2d 531 (2d. Cir. 1973) Lennon v. INS 527 F.2d 187, 193 (2d. Cir. 1975); Mashi v. INS, 585 F.2d 1309, 1315-17 and n.15 (5th Cir. 1978). Cf. Mak v. INS, 435 F.2d 728, 730 (2d. Cir. 1978). The Court of Appeals also ignored, if not violated, the familiar canon of construction disfavoring reading by implication into a statute provisions absent in one section that are expressly provided in another section. Brewster v. Gage, 287 U.S. 327, 336 (1929).

In its answer to the question whether "even if authorized by statute" 8 C.F.R. 214.5, "is unconstitutional," the lower court has ventured into virgin constitutional soil by its holding that "distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive."3/ App. B-5 (underlining supplied)

Assuming that there is an inherent power vested in the Executive to deal with foreign students in the United States, "as an element of the language of diplomacy by which international courtesies are granted or withdrawn in response to actions by foreign countries," further questions are raised as to the nature of judicial review of the Executive action.

The three-judge penel holding that "the present controversy involving Iranian students in the United States lies in the field of our country's fireign affairs and implicates matters over which the President had direct constitutional authority," declared that "it is not the business of the Courts to pass judgment on the decisions of the President in the field of our foreign policy." App. B-7, 8

3/ Although the Court's opinion cited Saxbe v. Bustos, 419 U.S. 65 (1975); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976); and Fiallo v. Bell, 430 U.S. 787 (1977) for its holding, it must be assumed since its statement is in the disjunctive that the reference is to the power of Congress to make distinctions upon the basis of nationality. Each of the decisions cited, deal with differentiating treatment found to have been authorized or required by the Congress.

In its treatment of this sensitive issue, the District Court took as its point of departure the principle enunciated in Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) that "(w)hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." App. A-19

The diverse approaches to the function of the judiciary where there is a claimed exercise of foreign affairs powers is identified by the Joint Statement of the four circuit judges below:

> "It may be that the President, in these troubled days, has the power to decide that our deep aversion to selective law enforcement against a group solely on the basis of their country of origin must give way to some other imperative. The Supreme Court has certainly suggested that Congress has that power. Nevertheless, the question requires close scrutiny and our answer must reflect careful considerations of 'fine and often difficult, questions of values'." (citations ommitted) App. C-10

Apart from the considerations of the construction of the statute and of the applicability of the equal protection requirements of the Fifth Amendment, the Court of Appeals gave no cognizance to the question whether the principles of international law are binding upon the Executive in its treatment of Iranian students as a factor in the negotiations with the Iranian government to secure the release of the American hostages.

The joint Statement by the four dissenting judges on the Court of Appeals observed that "when the rule of law is being compromised by expediency in many places in the world, it is crucial for our courts that the United States does not retaliate in kind." App. C-10

This concern has been recognized by the State Department itself which has stated that discriminatory or aribtrary treatment cannot be imposed upon aliens "consistent with generally recognized principles of international law." See Digest of U.S. Practice of International Law (A. Rovine ed., 101-1, (1973). It is settled that international law is binding on the courts of the United States. The Paquete Habana, 175 U.S. 677 (1900). Especially in the context of a gross violation of the principles of international law by the Iranian government, it is appropriate for the judiciary of the United States to make certain that this government is scrupulous in its own observation of international law and that it does not engage in retaliatory treatment against Iranian nationals within the borders of this country. See Banco Nacionale de Cuba v. Farr Whitlock & Co., 383 F.2d 166-177, 183-85 (2d. Cir. 1967) cert denied 390 U.S. 956 (1968); ibid 307 F.2d 845,861, 864-8 (1964); Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 402-3 (1964); 43 Dept. of State Bull. 171, August 1, 1960; 1968 Covenant on Civil and Political Rights, Articles 2 (1) and (26), 77 Dept. of State Bull. 578, Oct. 24, 1977; 1969 American Convention on Human Rights, Articles 1 and 27 (1)(2), 77 Dept. of State Bull. 28, July 4, 1977.

CONCLUSION

Until the decision by the District of Columbia Circuit, no holding of any Court has read in implied grant of power into any statute enacted by the Congress to permit discrimination against persons upon the basis of their nationality.

And no Court has suggested that the Executive may impose discriminatory treatment upon the basis of any power conferred by the Constitution.

The decisions have been just the opposite.

Unless the restricted holdings of this Court in Hirabayashi, Korematsu, and Ex Parte Endo, 323 U.S. 283 (1944) rendered in time of war and the gravest

danger to this country, are to be applied here; unless the limitations upon the Executive imposed by Giegow v. Eby, 239 U.S. 3 (1915); Youngstown Sheet & Tube Co. v. Sawyer, 347 U.S. 579 (1952); Kent v. Dulles, 357 U.S. 116 (1958); and United States v. Nixon 418 U.S. 683 (1974) are to be enforced, the decision below may serve, in the words applied to the regulation by the District Court below, as a springboard of alarming elasticity for future extreme exertions of Executive power to App. A-24-5

A decision with such ominous implications, based as it is upon a gratuitous liberality in statutory construction and an unprecedented view of Executive power under the Constitution, warrants review by this Court. The grant of certiorari is justified expecially in view of the Government's representation to the court below that this case is "one of major importance to the crisis in Iran." With the contrariety of views among the judges below who have considered the issues, the importance of the questions presented impel resolution by the highest Court.

Respectfully submitted,

DAVID CARLINER

CHARLES GORDON
Attorneys for Petitioner

Carliner & Gordon
Suite 931 Investment Bldg.
1511 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 393-7341

Bruce J. Ennis, Esq.
American Civil Liberties Union
22 East 40th Street
New York, New York

Telephone: (212) 725-1222

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
DEC 11 1979
JAMES E. DAVEY, C...

GHOLAMREZA NARENJI, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 79-3189
BENJAMIN CIVILETTI, et al.,	:	
Defendants.	:	
CONFEDERATION OF IRANIAN STUDENTS,	:	
Plaintiff,	:	
v.	:	Civil Action No. 79-3210
BENJAMIN R. CIVILETTI,	:	
Defendant.	:	

MEMORANDUM OPINION

The Court is asked to determine whether 8 C.F.R. § 214.5, reprinted in 44 Fed. Reg. 65,727 (1979), which requires that by December 14, 1979, all Iranian nonimmigrant post-secondary students report to the nearest Immigration and Naturalization Service office for identification and examination of status, was validly promulgated within the authority bestowed upon the executive branch by statute and the Constitution.

The cases of Narenji v. Civiletti, Civ. No. 79-3189 (D.D.C. filed Nov. 21, 1979), and Confederation of Iranian Students v. Civiletti, Civ. No. 79-3210 (D.D.C. filed Nov. 27, 1979), were consolidated on November 27, 1979, Fed. R. Civ. P. 42(a), with a full hearing on the merits held December 4, 1979. Narenji has been filed as a class

action[1] by three nonimmigrant students from the Islamic Republic of Iran on behalf of all Iranians admitted to the United States as nonimmigrant students and affected by the questioned regulation. Plaintiffs ask for declaratory and injunctive relief against Attorney General Benjamin R. Civiletti and Acting Commissioner of Immigration and Naturalization David Crosland, seeking both a declaration that 8 C.F.R. § 214.5, is unconstitutional and an injunction against its enforcement. Section 214.5, which is set forth fully in appendix A of this memorandum opinion, is an Immigration and Naturalization Service (INS) regulation that requires all Iranian nonimmigrant students to report to INS by December 14, 1979, with evidence of their current status. Plaintiff Confederation of Iranian Students, with approximately 1500 members, also seeks a declaratory judgment and injunctive relief[2] against Attorney General Civiletti in regard to the same regulation, praying further that requests for discretionary relief made by Iranian students be treated similarly to those made by nonimmigrant students of other nationalities and that no Iranian student who has reported to INS since November 13, 1979, in compliance with the regulation or

1/ A separate motion for class certification was filed on December 3, 1979, as required by Rule 1-13(c) of the Rules of the United States District Court for the District of Columbia. There being no opposition from defendants and the matter being appropriate for disposition under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2), the motion was granted at the time of the hearing. The class certified in this action consists of all nonimmigrant students from the Islamic Republic of Iran admitted to the United States pursuant to an F-1 or J-1 visa who were required by 8 C.F.R. § 214.5 to report to the Immigration and Naturalization Service (INS) before December 14, 1979, to provide information as to their residence and nonimmigrant student status.

A motion to intervene, filed by Andrew Pulley on December 3, 1979, pursuant to Federal Rule of Civil Procedure 24 was denied on the record at the hearing as untimely and because there was an insufficient showing by his counsel, who also represented the Narenji plaintiffs, that the disposition of this action would impair Mr. Pulley's interests.

As to the plaintiffs' motion for expedited discovery in Narenji, the matter is now moot. The Government previously had agreed to supply the documents available, subject to any privilege claimed.

2/ Plaintiff originally sought both a temporary restraining order and a preliminary injunction but agreed, pursuant to Federal Rule of Civil Procedure 65(a)(2), to have the entire case heard on the merits on December 4, 1979.

who was subject to this regulation, be deported.

This cause must be viewed in light of what has come to be recognized as an unprecedented violation of international law, overwhelmingly condemned, which commenced almost six weeks ago and which breached the absolute principle that the personnel and property of a diplomatic mission are inviolate.

On November 4, 1979, approximately 2500 Iranian demonstrators, described as "students," invaded and illegally occupied the United States Embassy in Tehran, Iran. Declaration of Warren Christopher ¶1, Exhibit 7 to Memorandum of Points and Authorities in Opposition to Plaintiffs' Motions for Injunctive Relief, Narenji v. Civiletti, Civ. No. 79-3189 (D.D.C. filed Nov. 30, 1979) [hereinafter referred to as Christopher Declaration]. Approximately sixty-five American citizens working in the embassy compound were taken hostage in an attempt to force this country to agree to certain demands that have been recognized as unacceptable. Id. Although some of the hostages were released just prior to Thanksgiving Day, fifty are reportedly still being held.

The hostages' captors, estimated to number from three to four hundred within the embassy compound, have threatened to kill the hostages if there is any attempt to free them. Id. Demonstrations outside the compound have been held on almost a daily basis and at times have involved tens of thousands of demonstrators. Id.

Despite its commitment to do so, the government of Iran has failed to take action to protect the embassy or its personnel. Id. ¶3. Following the embassy takeover, the Prime Minister and a large number of cabinet officers resigned. Id. A new cabinet has been named, but the successor government has been unwilling to secure the safe release of all hostages or to meet with the United States' emissaries dispatched to secure the release of the hostages. Id. The students inside the compound have rigidly refused to moderate their demands. Id.

The violent actions in Iran have not only outraged all Americans, but have been universally condemned by other nations throughout the

world. While a United Nations Security Council meeting convened to help negotiate a release of the hostages proved fruitless because of the refusal of Iran to participate, the president of the council has made public statements on behalf of its members, appealing for the immediate release of all hostages.

During the crisis, the President has conferred daily, and often several times a day, with Secretary of State Cyrus Vance and other senior officials of the Administration. Id. ¶ 5. Recognizing the growing anger among our citizens, the President issued a statement to the nation on November 9, 1979, urging all public officials and private citizens to exercise restraint and appealing to "every American to refrain from any action that might increase the danger to the American hostages [in Tehran]." White House Statement on American Hostages in Iran, 15 Weekly Comp. of Pres. Doc. 2101, 2102 (Nov. 9, 1979).

As the grave situation continued to escalate with increasing threats by the Iranian captors and a mounting clamor echoing from the demonstrators outside our embassy in Tehran, President Carter on November 10, 1979, directed the Attorney General to "identify any Iranian Students in the United States who are not in compliance with the terms of their entry visas, and to take the necessary steps to commence deportation proceedings against those who have violated applicable immigration laws and regulations." Announcement on Actions To Be Taken by the Department of Justice, 15 Weekly Comp. of Pres. Doc. 2107, 2107 (Nov. 10, 1979); Christopher Declaration ¶ 6. This directive was one of several measures taken in response to the grave international crisis created by the detention of the American hostages. Others have included presidential orders that oil produced in Iran not enter the United States, Pres. Proc. No. 4702, 44 Fed. Reg. 65,581 (1979), and that, a national emergency existing, the assets of Iran located in this country be frozen, Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). Throughout, the President has emphasized the gravity of the crisis and commented on the necessity for Americans to maintain constraint, despite the intensity of emotion. On

November 13, 1979, in response to the President's November 10 directive and acting, as expressed, pursuant to his powers under the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1103(a), 1184(a) (1976), the Attorney General issued the challenged regulation, 8 C.F.R. § 214.5, to be effective immediately and to be applicable only to Iranian students.[3/] The regulation directs Iranian nonimmigrant post-secondary students to report to INS by December 14, 1979, with evidence of their residence and student status, including their passport, a letter of good-standing from their school, and evidence of their current address. Failure to comply or willfully supplying false information would subject such students to immediate deportation proceedings. The notice and comment and delayed effective date provisions of 5 U.S.C. § 553 specifically were waived in the announcement concerning the regulation as being impracticable and contrary to the public interest.

The Narenji plaintiffs' main challenge to the regulation is that it is violative of the fifth amendment because defendants have singled out only Iranian students. They claim that this constitutes discrimination on the basis of national origin, a suspect class, requiring strict judicial scrutiny and a compelling governmental objective in order to pass constitutional muster. Those plaintiffs also contend, however, that the regulation violates the fourth amendment because the "compelled interrogation" by INS officials constitutes an illegal seizure in that INS has no reasonable grounds to suspect that a particular Iranian student may have violated the conditions of his or her nonimmigrant status. Further, plaintiffs in Narenji claim section 214.5 violates the first amendment, alleging that the primary purpose of the regulation at issue was both to punish Iranian

---

3/ Although plaintiffs have raised some question about the extent to which the President authorized the Attorney General to promulgate 8 C.F.R. § 214.5, it is apparent that its creation was a coordinated action on the part of those executive branch officials having primary responsibility in the area of foreign policy and in the regulation of immigration and naturalization. Compare Remarks of the President at the Thirteenth Constitutional Convention of the AFL-CIO, 15 Weekly Comp. of Pres. Doc. 2120, 2121-22 (Nov. 15, 1979) and Announcement on Action To Be Taken by the Department of Justice, 15 Weekly Comp. of Pres. Doc. 2107, 2107 (Nov. 10, 1979) with 8 C.F.R. § 214.5, reprinted in 44 Fed. Reg. 65,728 (1979).

students in the United States for past demonstrations and to chill the future exercise of their rights of speech, association, and assembly. An additional cause of action in plaintiffs' amended complaint asserts defendants' failure to comply with the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, and the lack of statutory authority for the regulation. Plaintiff Confederation of Iranian Students similarly challenges the issuance of the regulation as violative of the Administrative Procedure Act in that the notice and comment procedure was improperly waived and because the Attorney General exceeded the authority vested in him under the Immigration and Nationality Act. That plaintiff also alleges defendant Civiletti's action violates tenets of international law and the first and fifth amendments.

Addressing these allegations of invalidity, defendants contend that the waiver of notice and comment was appropriate, as were the terms of the regulation itself, which, they say, were proper under the authority given to the Attorney General pursuant to section 1103(a) of title 8, which gives the Attorney General the power to administer and enforce all laws relating to alien immigration and naturalization, and 8 U.S.C. § 1184(a), which prescribes the power of the Attorney General to issue regulations to govern the admission of nonimmigrant aliens and to insure the departure of those individuals who violate the terms of their nonimmigrant status. Defendants also assert that the regulations cannot be found to violate the fifth amendment in that the foreign policy determinations of the President and the Attorney General are not subject to judicial review, and, in any event, any discrimination involved is justified by compelling governmental objectives. Further, they contend that there has been no fourth amendment violation in that no "seizure" of the students has occurred and that the failure of plaintiffs to show any impermissibly selective enforcement of the regulation dooms their claim that the first amendment has been violated.

It being established that matters of constitutional import should be reached only if no other disabling defect can be discovered. in

a challenged statute or regulation, we must consider initially plaintiffs' assertions regarding the supposed nonconstitutional grounds for section 214.5's invalidity.

The first of these is their charge that the rule should be declared void because the Attorney General has not complied with the "notice and comment" provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B), which require that notice of a proposed regulation and time for comment on its contents be afforded the public unless there is an agency finding that good cause exists for waiver of the requirement because such a procedure would be "impracticable, unnecessary, or contrary to the public interest." To justify the waiver of notice and comment on the basis that it would be "impracticable and contrary to the public interest", the instant regulation states that it was "issued in the course of, and in response to, the international crisis created by the unlawful detention of American citizens in Tehran." Nevertheless, plaintiffs argue that the Court should find the waiver improper since defendants' general invocation of the Iranian crisis does not explain precisely why it is impracticable or contrary to the public interest to comply with the notice and comment requirement.

Defendants counter that these regulations were the result of rulemaking involving a "foreign affairs function of the United States" and thus are exempt from the notice and comment requirements under section 553(a)(1) of title 5 and that the reasons given in the regulation are sufficient to support its exemption from the provisions for notice and comment. As to the former argument, although a foreign event may have provoked the promulgation of section 214.5, this in and of itself cannot exempt it from the Administrative Procedure Act, especially in light of the recognized application of the APA to deportation proceedings, Wong Yang Sung v. McGrath, 339 U.S. 33, 51 (1950). While the Supreme Court's ruling in that instance subsequently was legislatively overruled, Supplemental Appropriations Act of 1951, Pub. L. No. 81-843, 64 Stat. 1048, there was no indication by Congress that its action was motivated by any intent to reassert a foreign

affairs exemption. How Ching Chow v. Attorney General, 362 F. Supp. 1288, 1290 & n.7 (D.D.C. 1973). The validity of the theory of Wong Yang Sung therefore endures and will not allow the executive to invoke the foreign affairs exemption to control a matter that essentially involves naturalization and deportation. Id. at 1290.

Turning then to an examination of the rationale given in the regulation itself for its exemption from the notice and comment requirement, while the reasons expressed are perhaps not as explicit as they might have been, they nonetheless are sufficiently set forth to demonstrate that good cause for a waiver existed. Assuming for the moment that the regulation at issue is valid, certainly any delay in its promulgation and effective date would proportionately weaken any effect it might have upon the grave crisis that triggered its creation, thereby rendering the notice and comment requirement impracticable and contrary to the public interest. See DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App.), cert. denied, 419 U.S. 896 (1974). Defendants' waiver of notice and comment was not in violation of section 553(b)(B).

Plaintiffs also challenge the validity of certain specific provisions of section 214.5, to wit, its requirement that when reporting, Iranian students must bring their passport and Form I-94 alien registration statement, evidence of enrollment from their school, a letter from school officials showing they are maintaining the proper number of credit hours, and evidence of current address, 8 C.F.R. § 214.5(a)(1)-(5), as well as its statement that failure to appear will constitute a violation of the conditions of the students' stay, subjecting them to deportation proceedings. Putting aside the constitutional issues involved in the enforcement of section 214.5, the Court finds its requirements and conditions to be proper as within the latitude given the executive under section 1184(a) "to insure that . . . upon failure to maintain status under which he was admitted . . . such alien will depart from the United States." The various documents the students are required to bring obviously are relevant to the question of whether they are maintaining their status

and, therefore, within the intent of Congress in this regard. The noncriminal, regulatory nature of immigration proceedings likely precludes any assertion that a constitutional violation might be thought to arise because of the compulsory production of the documents in question. See United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970), aff'd on other grounds, 404 U.S. 293 (1971). Similarly, the requirement that failure to report will be considered a violation of status comes within the Attorney General's power to insure that nonimmigrant aliens who are out of status will leave this country. While it is quite unlikely, in light of the pro-alien, anti-deportation policy of Congress as recognized by the federal courts, that an inadvertent failure to appear would be held to be sufficient grounds for deportation, see Mashi v. INS, 585 F.2d 1309, 1315-17 & n.15 (5th Cir. 1978), the need to insure that those called will indeed respond obviously effectuates the congressional purpose inherent in section 1184(a).4/

Their nonconstitutional arguments failing, plaintiffs next rely on the due process clause of the fifth amendment, asserting that the regulation in question is unconstitutional because it constitutes a violation of that amendment's guarantee of equal protection of the laws. By focusing only upon those nonimmigrant students who are citizens of the Islamic Republic of Iran, plaintiffs contend, the defendants have promulgated a regulation the effectiveness of which is dependent on the individual's national origin, an impermissible basis for such a rule.

Plaintiffs are quite correct in their assertions that the classification in this instance is one founded upon national origin and that the constitutional guarantee of equal protection can be invoked in most circumstances to protect against the government's invocation of such a standard, even in its dealings with aliens.

4/ Plaintiffs have also raised questions about certain Immigration and Naturalization Service administrative practices under the regulation. In particular, they challenge the practice of photographing those students who appear pursuant to the regulation and further protest against the alleged "chill" that certain directives of the President and the Attorney General have placed upon the usual willing-

See Yick Wo v. Hopkins, 118 U.S. 356 (1886). Further, it has been long acknowledged that distinctions based on ancestry or national origin are "odious to a free people whose institutions are founded upon the doctrine of equality," Hirabayashi v. United States, 320 U.S. 81, 100 (1943); accord, e.g., Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944), and will be cause to signal the type of strict judicial scrutiny afforded a "suspect" classification in order to determine whether it is proper

---

4/ (cont.) ness of INS officials to exercise their discretion to excuse certain minor violations of the conditions of the nonimmigrant students or to take alternative actions that would not result in deportation. As to the former, while section 1301 of title 8 provides for the fingerprinting of all aliens who enter the country, there appears to be no explicit authority allowing them to be photographed. On the other hand, as it was represented to the Court by plaintiffs at the oral hearing in this matter, the student's passports, which they properly are required to produce as the Court has noted, see p.8 supra, already contain their photographs. Although the government's procedure thus seems somewhat duplicative, it is not unreasonable to assure identification and, accordingly, there is no basis to deny the government the opportunity to retake a photograph that can be required to be produced anyway. Regarding the matter of INS discretionary relief, while denying that they are seeking to mandamus INS officials to perform a discretionary function, which they cannot do, see, e.g., Knable v. Wilson, 187 U.S. App. D.C. 48, 51 & nn. 9-10, 570 F.2d 957 960 & nn.9-10 (1977) (citing authorities), plaintiffs nonetheless assert that an injunction will lie to prevent the Attorney General and the INS from denying students this relief. As support for this proposition, plaintiffs rely on United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), in which the Supreme Court dealt with the issue whether the Attorney General could influence the discretion in ruling on deportations that he had afforded by regulation to the Board of Immigration Appeals. Since the Attorney General had transferred all discretion in the matter to another body, he could not thereafter seek to influence or otherwise exercise that discretion, id. at 266-67; however, a failure to exercise the discretion afforded the board had to be shown, id. at 268. It is thus apparent that if it is indeed accurate that the Attorney General has sought improperly to influence discretion afforded solely to INS officials (there is no evidence whatsoever of this allegation at this time) relief can only be granted on a case by case basis, at which time the discretion, or lack thereof, exercised by immigration officals can be examined fully.

as based upon a compelling governmental interest.5/

Acknowledging these established principles of constitutional law, defendants nonetheless seek to avoid their application by asserting that they simply are not relevant in this instance. In support of this theory, they point to what they claim is equally well-established precedent regarding the entitlement of the Congress and the executive to deal with the immigration and naturalization of aliens.

The power of Congress over naturalization and immigration arises from clause 4 of section 8 of article 1 of the Constitution, which provides for congressional authority "[t]o establish a uniform Rule of Naturalization . . . ." The United States Supreme Court has recognized that "as firmly imbedded in the legislative and judicial tissues of the body politic as any aspect of our government" is the principle that responsibility for the formulation of "policies pertaining to the entry of aliens and their right to remain here . . . is entrusted exclusively to Congress." Galvan v. Press, 347 U.S. 522, 531 (1954). It is not surprising then that the Supreme Court has also declared that "over no conceivable subject is the legislative power of Congress more complete than over" the immigration and naturalization of aliens. Oceanic Stream Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); accord, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). Congressional power to act in such matters is so broad as to entitle Congress to "make rules that would be unacceptable if applied to citizens." Mathews v. Diaz, 426 U.S. 67, 80 (1976).

5/ Besides the guarantee of equal protection of the laws, aliens lawfully admitted to this country are entitled to a panoply of substantive and procedural rights under the Constitution. In criminal proceedings, aliens enjoy the protection of the fourth, fifth, sixth amendments, and very likely the eighth amendment as well. 1 C. Antieau, Modern Constitutional Law § 9:25, at 718-19 (1969). Similarly, in civil proceedings they are entitled to the same procedural protections as citizens, including the right to a jury trial. Id. at 719. The first amendment protections of speech, press, religion, assembly, and association also apply to aliens here in this country, as do the freedom to contract, freedom of enterprise, and the right to work. Id. § 9:26, at 720. Further, an alien being deported is entitled to procedural due process, including a fair hearing conducted in good faith and preceded by proper notice adequately specifying the grounds for governmental action. Id. § 9:29, at 725-26. At the hearing, the alien has the right to be heard, to present witnesses and evidence

In its role as policy maker, Congress is aided by various executive branch officials, most particularly the Attorney General, who have the responsibility for insuring that the statutory policies of Congress concerning immigration are implemented and enforced. In analyzing the scope of the power of the two branches, as well as the relationship between them, in matters dealing with immigration and naturalization, Justice Gray nearly one hundred years ago stated:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893). As Justice Gray illuminated, the nature of many of the policy decisions involving immigration and naturalization are based upon foreign policy considerations, and thus have been left to the political departments of the federal government. This, in turn, affords a very narrow scope for judicial review of congressional or executive actions. See, e.g., Fiallo v. Bell, supra, 430 U.S. at 796; Hampton v. Mow Sun Wong, 426 U.S. 88, 101 & n.21 (1976); Mathews v. Diaz, supra, 426 U.S. at 81.

Drawing upon these established notions, defendants argue that the Court is precluded from conducting a constitutional examination of the regulations in question, except to review whether they are somehow "wholly irrational." This result, they contend, is mandated by the decisions of the Supreme Court which have interpreted the powers of the Congress and the executive in immigration matters. They fail to consider, however, a fundamental distinction between those decisions and the instant actions. In the other cases, the challenged provision was either a specific statutory enactment of Congress, Fiallo v. Bell, supra, 430 U.S. at 788-89; Mathews v. Diaz, supra, 426 U.S. at 69-70; Kleindienst v. Mandel, supra, 408 U.S. at 754-56; Galvin v. Press, supra, 347 U.S. at 529-32; Harisiades v. Shaughnessy, 342 U.S. 580, 583-84 (1952), a regulation promulgated directly under the authority of an act of Congress, United States ex rel. Knauff v.

Shaughnessy, 338 U.S. 537, 540-42 (1950),[6] or a regulation that was promulgated pursuant to authority other than that of the Congress or the executive over immigration and naturalization matters, Hampton v. Mow Sun Wong, supra, 426 U.S. at 114-116. In this instance, while Congress has given the Attorney General broad, general authority to promulgate the regulations for aliens and to establish the conditions for their entry, the later violation of those conditions being deemed sufficient to serve as just cause for deportation, 8 U.S.C. §§ 1103(a), 1184(a) (1976), those enactments are drawn neutrally in that they refer to "aliens" without giving the Attorney General explicit authority to discriminate among aliens on the basis of national origin. The obvious question then, is what was the congressional intent in this regard?

6/ Defendants cite United States ex rel. Knauff v. Shaughnessy in support of their position, quoting in part from the following passage:

> Petitioner contends that the 1941 Act and the regulation thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens it is not dealing alone with a legislative power. It is implementing an inherent executive power.
>
> Thus, the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive.

338 U.S. 537, 542-43 (1950) (citations omitted) (4-3 decision). Despite this broad language, the Court was careful to point out that the action of the Attorney General barring an alien's entry into this country was within the discretion afforded him by a broad congressional enactment dealing with exclusion of aliens. Id. at 543-44. In addition, the Court itself noted that this broad executive power was not necessarily the rule with regard to the "deportation of persons who have gained entry into the United States," id. at 543, distinguishing its holding from the circumstances involved in this case. Moreover, to whatever extent Knauff might be read to support defendants' position, its application to the present case is questionable in light of the Supreme Court's later decision in Kent v. Dulles, 357 U.S. 116 (1958), in which the Court refused to allow the Secretary of State, absent congressional authorization, to abrogate a citizen's fundamental right to travel by denying him a passport. See pp. 17 - 18 infra; cf. United States ex rel Knauff v. Shaughnessy, supra, 338 U.S. at 551-52 (Jackson, J., with Black & Frankfurter, JJ., dissenting) (statutory authorization for excluding aliens not sufficiently explicit to allow executive official to bar entry of alien wife of American citizen without

Certainly, the established canons of statutory interpretation applied to the immigration and deportation statutes, which require a strict construction so as not "to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used," Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); accord, e.g., Mashi v. INS, supra, 585 F.2d at 1316; Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975), do not support the conclusion that defendants' discriminatory regulations are authorized by an express or implied congressional intent to allow deportation proceedings to be instituted on the basis of a national origin classification. Indeed, in numerous other enactments Congress has indicated its disdain for discrimination based on national origin. See, e.g., 42 U.S.C. § 2000a (1976) (public accomodations); id. §2000b (public facilities); id. § 2000c-6 (public education); id. § 2000d (federally assisted programs); id. § 2000e-2 (employment). See also 42 U.S.C. §§ 1983, 1985 (1976). Further, throughout the statutory scheme governing immigration and naturalization, Congress has been very explicit in those instances when it desired that a particular group of aliens be treated in a manner different from others. See, e.g., 8 U.S.C. §§ 1101 (b)(5), 1153(a)(7), 1253(g)(1976); 8 U.S.C.A. 1182(a)(33) (West Cum. Supp. 1979). We, therefore, find no statutory basis for the discriminatory classification established by the regulation such that defendants could cloak their rule's discriminatory effect in the mantle of congressional approval under its power over immigration and naturalization and thereby for practical purposes, exempt the regulation from judicial scrutiny.7/

7/ We note that Congress has not been totally silent on the subject of the President's duty to free any American citizen unjustly imprisoned overseas, for it has declared that "the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release. . . ." 22 U.S.C. § 1732 (1976). While the defendants have made a passing reference to this enactment, they do not rely upon it as a congressional endorsement of their actions, apparently believing, as does the Court, that while it may give the President some extra latitude to deal militarily or economically with a foreign nation holding American citizens, it does not act to authorize the Chief Executive to abrogate individual rights guaranteed by the Constitution.

Such a decision does not end the matter, however, for defendants have asserted that the inherent duty of the executive arising under section 4 of article II, to act in those matters involving this country's relations with the international community gives them authority concurrent with that of the Congress to act in the sphere of immigration and naturalization, likewise removing their actions in this instance from constitutional scrutiny by the Court.8/ The very nature of foreign affairs, they argue, involving as it does the shifting thrusts of diplomatic relations and the concommitant need for flexibility and rapid action, gives the executive the power to promulgate and apply this regulation only to Iranian students despite the fact that Congress has not authorized such discrimination in the creation and implementation of deportation procedures. The clear import of the defendants' argument is that, even without the approval of Congress, it nonetheless is the constitutionally delegated prerogative of the executive to act in this situation.

The question of the proper delegation of congressional and executive power has been debated for years and analyzed for decades, the paramount decision being Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In the absence of congressional authorization, Justice Black, on behalf of the majority, held that the President did not have authority pursuant to his powers as the Chief Executive or the Commander-in-Chief to seize the nation's steel mills and prevent a strike that would have halted the production of steel vital to the successful prosecution of the Korean War. In a concurring opinion Justice Jackson set forth an exposition of the relationship of congressional and executive power that defines well the parameters for analysis of the delegation problem now before the Court.

8/ While defendants also make reference to the general grant of executive power, U.S. Const. art. II, § 1, cl. 1, and to the executive's constitutional duty to faithfully execute the laws, id. § 3, cl. 1, these powers, at least in this instance, add little to the authority of the executive in matters of foreign affairs, which is the cornerstone of executive authority in this case. Moreover, it should be added that while the President has declared that a national emergency exists, Exec. Order No. 12170, 44 Fed. Reg. 65729 (1979), defendants have not attempted to claim that their actions were taken on the basis of the executive's war powers, see U.S. Const. art. II, § 2, cl. 1.

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at is lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 635-38 (footnotes omitted).

Relating these principles to the instant case, it is evident that there has not been what could be quantified as an express or implied Congressional authorization or denunciation of executive actions like those taken by the defendants here. While it is apparent that Congress has primary responsibility in the regulation of immigration, the executive, by reason of the foreign affairs

implications of any decision or action affecting aliens, is not without authority in this area. See Hampton v. Mow Sun Wong, supra, 426 U.S. at 101 & n.21; Mathews v. Diaz, supra, 426 U.S. at 81-82. Accordingly, Justice Jackson's "zone of twilight" must be the focus of the Court's consideration, where "any test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." Youngstown Sheet & Tube Co. v. Sawyer, supra, 343 U.S. at 637 (footnote omitted).

The "imperative of events and contemporary imponderables," as well as certain constitutional precepts, lend more than a modicum of support to defendants' assertions of authority. The present crisis in Iran sorely tests the executive's ability to firmly demonstrate this country's willingness to resist this form of international blackmail while, at the same time, acting in a manner that fully reflects the fundamental American belief in individual liberties applied evenly, dispassionately and justly, with equal treatment for all persons, whether they agree or disagree with the aims of those holding the innocent American citizens in Tehran. The very nature of the executive and its power to conduct foreign affairs places that branch of government and its officials at the forefront where it must bear the brunt of the awesome responsibility for protecting our national interest in seeing that the inviolability of this nation's diplomatic missions is respected, yet simultaneously protecting the rights of each individual, including those who do not seek to further that ideal. This then is the dichotomy of foreign affairs which has caused the Supreme Court to observe that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of the government to respond to changing world conditions should be adopted only with the greatest caution." Mathews v. Diaz, supra, 426 U.S. at 81.

But, above all, it is patent that the executive, even in the area of immigration and naturalization, must be subject to applicable principles of the Constitution. See Galvan v. Press, supra, 347 U.S. at 531; Fong Yue Ting v. United States, supra, 149 U.S. at 713.

To allow the executive to, in effect, delegate to itself the power to abrogate the important, constitutionally protected right to equal protection of the laws under the statutes governing immigration when Congress, which has primary responsibility for the policy decisions in immigration matters, has not acted, exceeds the proper boundaries within which the three branches of our constitutional government co-exist.

In resolving this conflict between the need for executive expediency and the ideal of individual liberty, we consider the analagous situation in Kent v. Dulles, 357 U.S. 116 (1958). In Kent, the issue was whether the Secretary of State, acting pursuant to a broadly worded congressional enactment bestowing upon him the authority to issue passports, had the power to curtail the right of a citizen to travel by issuing and enforcing a regulation denying passports, which were necessary to leave the country, to alleged Communists or those refusing to submit an affidavit denying membership in the Communist party. Despite the general language of the congressional enactment that was the basis of the Secretary's regulation, the Court found that when Congress passed the provision, it merely intended to adopt the existing administrative practice under which the Secretary had denied passports only for failure to show allegiance to the United States or upon proof of participation in criminal activity. 357 U.S. at 127. While recognizing that the foreign affairs power of the executive was implicated in the issuance of a passport in that such a document extended some diplomatic protection to the bearer, in light of the impact upon the individual's fundamental right to travel were it withheld, the Court refused to accept that executive power as a valid basis upon which the Secretary could rest his authority to promulgate the regulations, stating that "[i]f that 'liberty [to travel]' is to be regulated, it must be pursuant to the lawmaking functions of the Congress." Id. at 129.

As in Kent, the right here involved--the guarantee of equal protection of the laws implicit in the due process clause of the fifth amendment--is one fundamental to the individual freedom of all persons, citizens and aliens alike, and it is one that the

action of the executive threatens to totally annul. The effect of the regulation at issue is to establish two classes of nonimmigrant students, Iranians and non-Iranians, each of which is to be subjected to a different type of executive action. This classification, based as it is on national origin, would, under the usual equal protection analysis, merit strict judicial scrutiny to determine whether it is supported by a compelling governmental interest. Recently, however, in Hampton v. Mow Sun Wong, supra, 426 U.S. at 100, the Supreme Court declared that in instances when the guarantee of equal protection under the due process clause of the fifth amendment is invoked against a federal enactment or regulation, a different analysis may be required in that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." In further explaining the appropriate standard to be applied in such circumstances, the Court stated that "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a state, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." Id. at 103. Defendants here allude to three interests that might qualify as "overriding national interests" justifying their discriminatory regulation: 1) the protection of the lives of the hostages held in Iran by quelling potential domestic violence; 2) the need to express to the government in Iran this country's displeasure with events in Tehran; 3) the need to identify Iranian students to assist in the development of appropriate responses to the crisis in Iran.

Of these three interests only the former, the protection of the hostages, even deserves consideration for the label "overriding." The need to express American anger at Iranian actions is hardly sufficiently compelling to justify subjecting only Iranian students to a discriminatory thirty-day roundup that violates the fundamental principles of American fairness, especially since numerous other retaliatory actions, political, economic and otherwise, can be invoked to accomplish the same purpose without disrupting the lives of so many

who come to this country merely to receive an education with which they could better themselves and their native land. So too, the census taking interest asserted, being one of administrative convenience, cannot be called "overriding." Moreover, even as to the highest priority national interest in protecting the hostages, which all of us share, the reasons advanced for the government's discriminatory actions make it clear they do not serve that interest, there being at best a dubious relationship between the presence of Iranian students in this country, whether legally or otherwise, and the safety and freedom of the hostages. According to the defendants, the possibility that Americans may commit acts of violence against Iranians in this country, which, in turn, may cause a hostile counter-reaction in Iran, justifies this regulation. If the government's fear in this regard is based on the possibility that Iranian students through demonstrations or otherwise, will provoke Americans into action, then this regulation fails to address that concern unless it is true that only those Iranian students who are here illegally and can be deported are likely to commit such acts (or the purpose of the regulation is somehow to prohibit free speech, which raises constitutional questions). On the other hand, if the government's fear is that by their very presence Iranian students will provoke violence, then again this regulation does not address the problem, for it is designed only to identify and expel those who are here illegally, all others being free to remain as targets of violence. This leaves only a psychological purpose for the regulation, its intent being one of assuaging the anger of the American people by demonstrating that something is being done in the face of crisis. Yet, this undeniably tenuous cause and effect relationship between this inherently discriminatory regulation and the unpredictable emotional reaction it is to temper, based as it must be on speculation, utterly fails to demonstrate that the regulation indeed serves the national interest in protecting the hostages. Cf. Jackalone v. Andrus, No. 79-3140 (D.C. Cir. Nov. 19, 1979). In essence, although defendants' regulation is an understandable effort

designed to somehow reply to the Iranian attack upon this nation's sovereignty and the seizure of its citizens, it is one that does not support a legitimate national interest and therefore would not excuse the wholesale nullification of the rights of the students involved or save 8 C.F.R. § 214.5 from violating the equal protection guarantee of the fifth amendment.[9/]

In juxtaposition to the regulation's violation of plaintiffs' constitutional right to equal protection of the laws is the asserted power of the executive to act in the area of immigration and naturalization under its constitutional authority to conduct foreign policy. In invoking this prerogative, defendants seek to draw upon a reservoir of executive power that is necessarily of great depth, being based as it is upon the need for executive freedom of action as it performs the complex and delicate task of directing this country's relations with other members of the international community. See Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103,111 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-21 (1936). The crisis now facing the nation well illustrates the need for the wide degree of latitude afforded the executive in foreign relations.

In balancing the obviously weighty considerations involved in this case--the Constitution's abhorrence of discrimination based on national origin, the need to protect against improper assertions of executive power in those areas where the Constitution has placed with the elected representatives of the Congress the primary responsibility for action, and the executive's need for freedom of action in international affairs--we can only conclude that if the violation of equal protection inherent in the regulation at issue here is to be countenanced, "it must be pursuant to the lawmaking functions of the Congress." Kent v. Dulles, supra, 357 U.S. at 129.

9/ Likewise, if traditional equal protection analysis were applied in this instance, the same reasons that demonstrate the government's failure to justify its actions as based on an "overriding national interest" would show that the interests asserted are not sufficiently compelling to meet the standard of strict scrutiny required in examining classifications based on national origin.

While the intrusion upon the individual liberty of these aliens in this instance might have seemed at first blinking wholly justified in terms of the result sought, to allow its destruction of our fundamental tenets would throw open the door to further broad and potentially dangerous assertions of executive power over aliens, exclusive of the protections the Constitution provides. Today there are few major occurrences, domestic or otherwise, without significant international impact. There are many opportunities for the executive to invoke its authority to conduct foreign policy and thereby delegate to itself the authority to, in effect, assume the role of Congress, the elected, representative body with which the primary responsibility for immigration policy making rests, and thus assure that its actions will be afforded that immunity from judicial review that courts have recognized accrues to legislative efforts in that field. Accordingly, the promulgation of 8 C.F.R. § 214.5 being an act lying outside of the bounds of the authority conferred on the defendants by the Congress and the Constitution, that regulation is determined to be unconstitutional.

Having established the unconstitutionality of 8 C.F.R. § 214.5, we now consider the question of the proper remedy to be afforded to those who are affected by its terms. An order will be entered this date permanently enjoining defendants from further enforcement of 8 C.F.R. § 214.5, thereby relieving all those Iranian students in the class represented by plaintiffs who have not yet reported to INS pursuant to section 214.5 from the need to do so. There remains, however, the matter of the relief to be accorded to those students who have already complied with what has now been determined to be an unconstitutional regulation. To remedy any injury they may have suffered the Court will also permanently enjoin the defendants from continuing any present deportation proceedings instituted against students as a result of their compliance with section 214.5 and from using any information, written, oral, or photographic, gathered from those Iranian students who have reported to the Immigration and Naturalization Service pursuant to section 214.5 in any administrative

function or in any proceeding under the immigration laws which, as a result of that information would result in deportation or otherwise penalize the student concerned. While somewhat akin to the rule of exclusion under the fourth amendment, this injunctive ban on the use of the information gathered under the regulation obviously is not intended to forever preclude the institution of proceedings against any member of the class of Iranian students who are the subject of this litigation.

If the Congress, acting within the Constitution, should hereafter enact a statute designed to allow the immigration authorities to check the status of these nonimmigrant students and, in the course of enforcing that enactment, information identical to that which has been gathered under section 214.5 is requested or revealed, so long as the original information discovered under section 214.5 was not in any way involved in the institution or prosecution of the new enforcement proceeding, the newly garnered but identical information could be used. It should be added that the injunctive relief granted pertains only to information furnished pursuant to section 214.5.

It is emphasized that this injunction in no way precludes the Immigration and Naturalization Service from taking any lawful action against a student when it becomes aware that student, through its own pursuit of truth, is in violation of status, provided that discovery is not based upon information gained pursuant to section 214.5. Accordingly, if a student is illegally in this country and subject under already existing laws to deportation, the INS has the authority to institute deportation proceedings or exercise its discretion, as it appropriately elects, to excuse the more minor transgressions.

The Court's holding today comes in the midst of an extraordinary international crisis. Despite unceasing efforts by the President and his advisors, the release of the hostages thus far has not been effectuated. Although the executive's carefully measured actions as earlier noted are commendable, the question must be asked--how far does the executive power extend? May the President or the Attorney General abridge those rights guaranteed by the Constitution in order

to further this country's foreign policy objectives? This Court thinks not. The President himself has made it clear that the crisis, albeit a situation creating far-reaching consequences, does not justify abridgement of those rights guaranteed by the Constitution and laws of this country.

> In this time of trial, our deep concern is for the lives of these brave hostages--our Nation's loyal citizens and faithful representatives. Every American feels anger and outrage at what is happening to them, just as every American feels concern for their safety and pride in their great courage. This crisis calls for firmness and it calls for restraint.
>
> * * * *
>
> I've directed our immigration authorities to review the visas of some 50,000 Iranian students, who are guests here in our country. Our Nation is fully committed to the enhancement of human rights, the protection of legal rights, and the enhancement of civil justice. All provisions of the United States Constitution will be honored. <u>All foreign nationals who are here lawfully may continue here with their work or studies. But those who are here illegally will be processed promptly and lawfully for deportation back to their own county</u>.

Remarks of the President at the Thirteenth Constitutional Convention of the AFL-CIO, 15 Weekly Comp. of Pres. Doc. 2120, 2121-22 (Nov. 15, 1979) (emphasis added).

The depth of this emotional, tragic crisis is of such consequence as to generate not only unusual solidarity of our citizens at home but to foster unrelenting unrest. It appears easy to foresake briefly our constitutional beliefs and realities and yield to the moment of time. But consider the result. What if any future international crisis arises of <u>any</u> dimension between our great country and another country. Would students, or any other classification of persons, simply because they happened to be present, be singled out, selectively corralled, and required to perform certain actions to affirmatively develop that they individually are blameless despite the action of their government?

To countenance the disparate treatment of Iranian students that this regulation candidly promotes would not only reject the most cherished constitutional precepts applicable to all of us, citizen and alien alike, but would create a precedent of alarming elasticity

from which future extreme assertions of executive power could readily springboard.

Constitutional submission to the wash of emotion would eliminate the fair play and equality that is the quintessence of the American way and it is cardinal that the diminishment of the rights of those most vulnerable diminishes in the end the rights of all others.

A finding that section 214.5 is unconstitutional being otherwise compelled, it is unnecessary to reach the issues of its validity under the first and fourth amendments and under international law.

An appropriate Order and Judgment for Permanent Injunction accompanies this memorandum opinion.

Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

Dated: December 11, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
DEC 11 1979
JAMES E. DAILEY, Clerk

GHOLAMREZA NARENJI, et al., :
Plaintiffs, :
v. : Civil Action No. 79-3189
BENJAMIN CIVILETTI, et al., :
Defendants. :
CONFEDERATION OF IRANIAN STUDENTS, :
Plaintiff, :
v. : Civil Action No. 79-3210
BENJAMIN R. CIVILETTI, :
Defendant. :

ORDER

Upon consideration of the Memorandum Opinion filed herewith, it is this 11th day of December 1979,

ORDERED, that plaintiffs' motion for class certification is granted. The class consists of all nonimmigrant students from the Islamic Republic of Iran admitted to the United States pursuant to an F-1 or J-1 visa who were required by 8 C.F.R. § 214.5 to report to the Immigration and Naturalization Service before December 14, 1979, to provide information as to their residence and nonimmigrant status; and it is

FURTHER ORDERED, that the motion to intervene filed by Andrew Pulley is denied; and it is

FURTHER ORDERED, that plaintiffs' motion for expedited discovery is denied as moot.

Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
DEC 11 1979
JAMES E. DAILEY, Clerk

GHOLAMREZA NARENJI, et al., :
Plaintiffs, :
v. : Civil Action No. 79-3189
BENJAMIN CIVILETTI, et al., :
Defendants. :
CONFEDERATION OF IRANIAN STUDENTS, :
Plaintiff, :
v. : Civil Action No. 79-3210
BENJAMIN R. CIVILETTI, :
Defendant. :

JUDGMENT FOR PERMANENT INJUNCTION

Upon consideration of the Memorandum Opinion filed herewith, it is this 11th day of December 1979,

ORDERED, that judgment is entered in favor of the plaintiffs Gholamreza Narenji, Behzad Vahedi, Cyrus Vahidnia, Confederation of Iranian Students, and the class certified in this action, which consists of all nonimmigrant students from the Islamic Republic of Iran admitted to the United States pursuant to an F-1 or J-1 visa who are required by 8 C.F.R. § 214.5 to report to the Immigration and Naturalization Service before December 14, 1979, to provide information as to their residence and nonimmigrant student status; and it is

FURTHER ORDERED, that judgment be and hereby is entered against defendants Benjamin R. Civiletti and David Crosland; and it is

FURTHER ORDERED, pursuant to 28 U.S.C. § 2201 (1976), that 8 C.F.R. § 214.5 be and hereby is declared unconstitutional; and it is

FURTHER ORDERED, that the defendants are permanently enjoined from enforcing 8 C.F.R. § 214.5; and it is,

FURTHER ORDERED, that the defendants are permanently enjoined from continuing any present deportation proceedings instituted against Iranian nonimmigrant students as a result of their compliance with 8 C.F.R. §214.5; and it is,

FURTHER ORDERED, that the defendants are permanently enjoined from using any information, written, oral, photographic or other, gathered from those Iranian students who have reported to the Immigration and Naturalization Service pursuant to 8 C.F.R § 214.5 in any administrative function or in any proceeding under the immigration laws that might result in deportation or any other penalty.

JOYCE HENS GREEN
United States District Judge

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2460 September Term, 19 79

Gholamreza Narenji
Behzad Vahedi
Cyrus Vahidnia

Civil Action No. 79-3189

v.

Benjamin Civiletti, Attorney General, et al.,
Appellants

United States Court of Appeals
for the District of Columbia Circuit
FILED DEC 1 1979
GEORGE A. FISHER
CLERK

No. 79-2461

Confederation of Iranian Students

Civil Action No. 79-3210

v.

Benjamin R. Civiletti,
Appellant

BEFORE: Wright, Chief Judge, Tamm and Wald, Circuit Judges

O R D E R

The government represents that this case is one of major importance relating to the crisis in Iran. The appellees represent that they will suffer significant constitutional injury if the regulation is reinstated. Under the circumstances, the Court is of the view that consideration on the merits should proceed with maximum expedition. On consideration thereof, it is

ORDERED by the Court that a special merits panel be drawn today to hear this case and that the motion for stay be referred to that panel.

Per Curiam

Circuit Judge Tamm did not participate in the foregoing order.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2460

GHOLAMREZA NARENJI
BEHZAD VAHEDI
CYRUS VAHIDNIA

v.

BENJAMIN CIVILETTI, ATTORNEY GENERAL, ET AL.,
APPELLANTS

No. 79-2461

CONFEDERATION OF IRANIAN STUDENTS

v.

BENJAMIN R. CIVILETTI, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Nos. 79-3189 & 79-3210)

Argued December 20, 1979

Judgment entered this date

Decided December 27, 1979

Robert E. Kopp, Attorney, Department of Justice with whom *Carl S. Rauh*, United States Attorney, *Ronald R. Glancz*, *Anthony J. Steinmeyer*, *Michael Jay Singer*, *Elizabeth Gere Whitaker*, *Brook Hedge*, *John F. Cordes*, Attorneys, Department of Justice were on the brief for appellants.

Eric M. Lieberman with whom *Alan Dranitzke* was on the brief for appellees, Narenji, et al.

Charles Gordon, for appellee, Confederation of Iranian Students.

Dale F. Swartz was on the brief for Amicus Curiae, Lawyers Committee for International Human Rights, urging affirmance.

Jordan J. Paust was on the brief for Amicus Curiae, Human Rights Advocates (U.S.A.), urging affirmance.

BEFORE: TAMM, MACKINNON and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBB.

Concurring opinion filed by *Circuit Judge* MACKINNON.

ROBB, *Circuit Judge*: This is an appeal from a judgment of the District Court declaring unconstitutional a regulation promulgated by the Attorney General at the direction of the President. In the circumstances of this case the court has concluded that the challenged regulation, 8 C.F.R. § 214.5, issued November 13, 1979, must be sustained.

Regulation 214.5 requires all nonimmigrant alien post-secondary school students who are natives or citizens of Iran to report to a local INS office or campus representative to "provide information as to residence and main-

tenance of nonimmigrant status." At the time of reporting each student must present his passport and evidence of his school enrollment, of payment of fees, of the number of course hours in which he is enrolled, of his good standing, and his current address in the United States. The regulation provides that failure to comply with the reporting requirement will be considered a violation of the conditions of the nonimmigrant's stay in the United States and will subject him to deportation proceedings under section 241(a)(9) of the Act.

The regulation is within the authority delegated by Congress to the Attorney General under the Immigration and Nationality Act. That statute charges the Attorney General with "the administration and enforcement" of the Act, 8 U.S.C. § 1103(a), and directs him to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of" the Act. *Id.* He is directed to prescribe by regulation the time for which any nonimmigrant alien is admitted to the United States, and the conditions of such an admission. 8 U.S.C. § 1184(a). Finally, the Act authorizes the Attorney General to order the deportation of any nonimmigrant alien who fails to maintain his nonimmigrant status or to comply with the conditions of such status. 8 U.S.C. § 1251(a)(9). These statutory provisions plainly encompass authority to promulgate regulation 214.5.

Recognizing the broad authority conferred upon the Attorney General by the Immigration and Nationality Act the District Court nevertheless thought that the Act does not empower him to draw distinctions among nonimmigrant alien students on the basis of nationality. We do not accept this conclusion. The statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him. *See Ahmed v.*

United States, 480 F.2d 531 (2d Cir. 1973); *Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir.), *cert. denied*, 400 U.S. 908 (1970); *Unification Church v. Attorney General*, 189 U.S. App. D.C. 92, 99-100, 581 F.2d 870, 877-78, *cert. denied*, 439 U.S. 828 (1978); *Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970). Furthermore, we note that the Act, 8 U.S.C. § 1303(a), does specifically authorize the Attorney General "to prescribe special regulations and forms for the registration and fingerprinting of . . . (5) aliens of any other class not lawfully admitted to the United States for permanent residence." Finally, failure to maintain nonimmigrant status or to comply with the conditions of such status is specified as a ground for deportation. 8 U.S.C. § 1251(a)(9). We conclude that promulgation of regulation 214.5 is directly and reasonably related to the Attorney General's duties and authority under the Act.

The District Court concluded that even if authorized by statute regulation 214.5 is unconstitutional because it violates the Iranian students' right to equal protection of the laws. The court found no basis for the "discriminatory classification" of the students established by the regulation. Here again we must differ. Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. *See Saxbe v. Bustos*, 419 U.S. 65 (1974); *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1970); *Fiallo v. Bell*, 430 U.S. 787 (1977); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 258 (1972); Maltz, *Alienage Classifications*, 31 OKLA. L. REV. 671, 684-91 (1978). So long as such distinctions are not wholly irrational they must be sustained.

By way of an affidavit from the Attorney General we are informed that his regulation was issued "as an element of the language of diplomacy by which international courtesies are granted or withdrawn in response

to actions by foreign countries. The action implemented by these regulations is therefore a fundamental element of the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran." The Attorney General refers of course to the lawless seizure of the United States Embassy in Tehran and the imprisonment of the embassy personnel as hostages. Those actions denied to our embassy and citizens the protection to which they are entitled under the Amity Treaty in force between the United States and Iran (284 United Nations Treaty Series 93), and under international law. The lawlessness of this conduct of the Iranian government was recognized by the decision of the World Court on December 15, 1979. *United States v. Iran*, General List No. 64 (Int'l Ct. Justice, Dec. 15, 1979). Thus the present controversy involving Iranian students in the United States lies in the field of our country's foreign affairs and implicates matters over which the President has direct constitutional authority. *Mathews v. Diaz, supra.*

The District Court perceived no "overriding national interest" justifying the Attorney General's regulation; it found that "although defendants' regulation is an understandable effort designed to somehow reply to the Iranian attack upon this nation's sovereignty and the seizure of its citizens, it is one that does not support a legitimate national interest". In this we think the District Court erred.

As we have said, classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis. *Mathews v. Diez, supra*; *Fiallo v. Bell, supra.* The Attorney General's regulation 214.5 meets that test; it has a rational basis. To reach a contrary conclusion the District Court undertook to evaluate the policy reasons upon which the regulation is based. In doing this the court went beyond

an acceptable judicial role. Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). As the Supreme Court said in *Mathews v. Diaz, supra*, at 81, 82:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication . . . . Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization. [Footnotes omitted]

And in *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) Mr. Justice Jackson wrote for the Court:

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [Footnote omitted]

This court is not in a position to say what effect the required reporting by several thousand Iranian students, who may be in this country illegally, will have on the attitude and conduct of the Iranian government. That is a judgment to be made by the President and it is not for us to overrule him, in the absence of acts that are clearly in excess of his authority.

In view of the foregoing the judgment of the District Court is reversed with directions to dismiss the complaints and enter judgment for the defendants.

So ordered.

MACKINNON, *Circuit Judge,* (Concurring): I concur completely in the court's opinion but write separately to add additional support for its ruling.

First, to indicate that this is not an isolated act of diplomacy in the international crisis that faces the United States I would stress that the record also reflects that, as part of the same diplomatic effort, the President by order prohibited "crude oil produced in Iran [from entering] the . . . United States" (Defendant's Ex. 3) and blocked all property and interests of the Government of Iran subject to United States jurisdiction (Defendant's Ex. 4). I also take judicial notice of the reports that substantial forces of the United States Navy have been moved to the Indian Ocean and the President has ordered the Iranian Embassy and consulate to return approximately 85% of its diplomatic staff to Iran.

It is also significant that Regulation 214.5 seeks "to identify Iranian students in the United States who are not maintaining status and to take immediate steps to commence deportation proceedings against such persons" (44 F. Reg. 65727) "*in accordance with constitutional due process requirements.*" (Defendant's Ex. 3).

The disparity in treatment afforded the appellee nonimmigrant alien students who are in violation of our immigration laws is based upon the fact that the Government of their home country has committed, and is committing, a number of violent lawless acts against the United States and its citizens. That unlawful conduct against the United States places appellees, and others similarly situated who owe their allegiance to that country, in a different class for immigration purposes from the nonimmigrants of any other country. Therefore, since their government has made appellees part of a distinctly separate class, the United States under our Constitution may treat them differently because of the reasons that

separate them from other aliens in the United States. The different treatment they may receive under subject regulation is directly related to the reasons for their different classification.

The status of Iranian aliens cannot be disassociated from their connection with their mother country since the alien "leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect." *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 (1951). The connection with the home country also means that the power of the United States Government to terminate the alien's stay is a necessary corollary to that observation:

> Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.
>
> War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

342 U.S. at 587-88. (Footnotes omitted)

It is thus my conclusion that the actions of the President and the Attorney General here questioned do "bear a reasonable relation to protection of the legitimate interests of the United States," *Harisiades v. Shaughnessy*, 342 U.S. 580, 584 (1951) and conform to due process requirements. *Id.* 588-591.

APPENDIX C

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 79-2460

Gholamreza Narenji
Behzad Vahedi
Cyrus Vahidnia

v.

Benjamin Civiletti, Attorney General, *et al.*,
Appellants

No. 79-2461

Confederation of Iranian Students

v.

Benjamin R. Civiletti,
Appellant

On Suggestions for Rehearing *En Banc*
(D.C. Civil Nos. 79-3189 & 79-3210)

Filed January 31, 1980

Opinion filed by *Circuit Judge* MacKINNON setting forth his reasons for voting against rehearing.

Joint statement of *Chief Judge* WRIGHT and of *Circuit Judges* ROBINSON, WALD and MIKVA setting forth their reasons for voting to rehear these cases *en banc*.

BEFORE: WRIGHT, *Chief Judge;* McGOWAN, TAMM, ROBINSON, MacKINNON, ROBB, WILKEY, WALD, and MIKVA, *Circuit Judges*

ORDER

The suggestions for rehearing *en banc* filed by appellees (Narenji, *et al.*, and Confederation of Iranian Students) and the brief in support thereof filed by amicus curiae (Assoc. of Arab American University Graduates) having been transmitted to the full Court and a majority of Judges not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellees' aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

Opinion of Circuit Judge MacKinnon on Rehearing.

MacKINNON, Circuit Judge: The following individual opinion responds to the petition for rehearing and the *amicus* brief.

The principal point raised b Appellees' petition for rehearing *en banc* points out that the court's opinion does not discuss the Supreme Court's decision in *Kent v. Dulles*, 357 U.S. 116 (1958) which Appellees' assert is the "leading case" on the issues here involved. In claimed reliance thereon Petitioners contend that the "statute vests no greater discretionary authority in the Attorney General" than the passport statute which was involved in *Kent*. That argument involves such a gross distortion of the facts and the holding in both *Kent* and this case, that it should be answered.

Kent arose under the passsport statute and involved *American citizens* who were not in violation of the laws of this country but who were denied passports because they refused to sign non-communist affidavits. Whereas this case primarily involves non-immigrant *aliens* who *are in violation* of our immigration laws.[1] To say that the Constitution and Immigration Laws vest the President and the Attorney General with no greater rights over *illegal aliens* than they do over *law abiding citizens* of the United States is a contention that answers itself. The court's opinion did not discuss *Kent* because *Kent* on its facts was substantially distinguishable from the facts of this case.

In this country we have given aliens very substantial rights, and the courts have been zealous in protecting those rights, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) but we have never held that aliens who are in this nation in violation of our laws have all the rights of law abiding citzens of the United States. The difference in the legal status of the

[1] To the extent that aliens covered by the Regulations are in compliance with our laws the regulation only has a minimal effect upon them and they are *not* subject to deportation.

individual involved in *Kent* and *Narenji* with respect to their citizenship and compliance with United States laws, thus places them in different classes and supports a difference in treatment. This difference in status and the effect of that difference on one's rights under the Immigration Laws was pointed to directly by Justice Douglas, in *Kent, supra*, when he remarked:

> "We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. [357 U.S. at 129] . . .The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. [357 U.S. at 128] . . .*If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case.*

357 U.S. at 130 (Emphasis added). The sentence in italics foreshadowed the President's exercise of his power in foreign affairs in the instant crisis.

Moreover, Congress by statute clearly authorized the Attorney General to prescribe regulations with respect to "non-immigrants", such as Appellees, who do not properly maintain their status and are required to depart the United States. Congress in 8 U.S.C. §1184(a) has provided that:

> "admission of. . .non-immigrant [aliens] shall be for such time and under such conditions as the Attorney General may by regulations prescribe. . .including such

conditions as the Attorney General shall prescribe, to insure that at the expiration of such time, or *upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under Section 248*, such alien will depart the United States."

8 U.S.C. §1184(a) (Emphasis added). The regulation here in question is so clearly authorized by this statute, and the other statutes referred to in the majority opinion, that petitioners do not present any substantial question by its argument in this case.

Petitioners real objection is to the manner in which the Attorney General through the Regulation has chosen to determine whether those in petitioners' class have maintained their status. The Regulation requires petitioners and others similarly situated to report and only those in violation of law are subject to being sent home. There is nothing novel or illegal about requiring aliens to report. That is the usual requirement which is applied to aliens of all classes. 8 U.S.C. §1305. The major difference here is one in slightly accelerated timing which is necessitated by the urgency of the present emergency involving Iran. Such regulation is well within the prosecutorial discretion vested in the Attorney General under his duty to *enforce* the Immigration Laws. Those statutes charge, "The Attorney General with the administration and *enforcement* of this [Immigration and Nationality] Act. . .He shall *establish such regulations; prescribe such. . .reports;. . .*and perform such other acts *as he deems necessary for carrying out his authority under the provisions of this Act.*" 8 U.S.C. §1103(a). (Emphasis added)

Additional authority, previously referred to, for the Regulation promulgated by the Attorney General stems from 8 U.S.C. §1303 which provides:

"(a). . .the Attorney General is authorized to prescribe *special regulations* and forms for *registration* and fingerprinting *of. . .(5) aliens of any. . .class not lawfully admitted to the United States for permanent residence.*" (Emphasis added).

Petitioners here are not admitted for permanent residence and have definitely been made a special "class" separate from non-immigrants of other nations by virtue of the violent and lawless acts which their Government has allowed to be committed against the United States and its envoys duly accredited to Iran. These facts clearly bring the Attorney General's Regulation within the statutory power vested in him by the statutes cited above.

Petitioners also assert that the court's opinion "nowhere indicates how the national identity of non-immigrant students is 'reasonably related' to the obligation of the Attorney General to assure that non-immigrant students are maintaining the lawfulness of their status in the United States and will depart this country when required. (Page 4). This statement, which professes to state the issue here, chooses to ignore the principal fact in the problem, i.e., that the Regulation is confined to *Iranian* students whose government in violation of all international law, 1 Oppenheim, *International Law*, §386, p. 789, has violently infringed in Iran upon the inviolability of over 50 of our diplomatic envoys in that country by countenancing their arrest by so-called "students" and imprisonment as hostages to demands that are beyond the constitutional power of this nation to fulfill. If under such strained circumstances between Iran and the United States, the reasonable relationship of the regulation to the departure of illegal *non-immigrant aliens* who owe their allegiance to Iran, and to the determination of the location of other non-immigrant Iranian nationals, is not self evident, petitioners are being opaque. The international crisis and confrontation in Iran is of such severity that those who are illegally in this country create a clear and present danger because of their allegiance and illegal status. Under the circumstances it is reasonable even as to those aliens who are legally here but profess their allegiance to Iran, that they should be located in case the international crisis worsens, so

that the Government may immediately take proper security measures to protect against the dangers which all aliens of such a foreign nation potentially create under such circumstances.

Petitioners also contend that the Regulation amounts to a "discriminatory classification " of those in their class. The basis for the separate classification and its reasonableness is set forth in the concurring opinion and petitioners have not even attempted to attack or answer that explanation. To repeat, the classification of non-immigrants from Iran, and particularly those who are here illegally, is valid and reasonable because they owe allegiance to Iran and Iran at the present time is the *only* nation that has with force and violence transgressed upon American property and imprisoned our diplomatic envoys as hostages in violation of our treaty and international law. I will not further point out the status of such acts under international law except to state that they justify more extreme action than is called for by the Regulation.

Petitioners argue, in effect, that non-immigrant Iranians must be treated the same as all other non-immigrants in the United States. The argument is absurd. In view of the acts of the Iranian Government against the United States and our accredited diplomats, non-immigrant Iranians in the United States at this time, and particularly those who are here illegally, are no more entitled to be treated the same as other non-immigrants than non-immigrants of any other nation would be entitled after their country has committed hostile acts against the United States.

It should also be recognized that prior to the issuance of the Regulation in question the President by Executive Order 12170 of November 14, 1979 did "declare a national emergency to deal with. . .the situation in Iran [which] *constitutes an unusual and extraordinary threat to the national security*, foreign policy and economy of the United States." Authority: International Emergency Economics Powers Act, 50 U.S.C.A. Sec. 1701 et seq., the National Emergencies

Act, 50 U.S.C. Sec. 1601 et. seq., and 3 U.S.C. Sec. 301. 44 Fed. Reg. No. 222, Thursday, November 15, 1979. (Deft's. Ex. 4) (Emphasis added).

The argument is advanced that the regulation deals improperly with Iranian *students*. The sympathy implicit in that characterization is misplaced. Those who are primarily affected and might be subject to deportation (unless they asked for asylum, delay for valid reasons, or raised compassionate considerations) would be sent home precisely because they are *not* students. As with the so-called *students* in Iran, that are blamed for all the mob action that the Government of Iran does not oppose, these *students* appear to be of the non-studying kind. How they continue to be students eludes me. A student by definition is one who is enrolled and attends educational classes. Those who are the object of this regulation, were admitted for that purpose, but they have not maintained their status as *students*. Hence, having ceased to be valid students, if they ever acquired that status, the basis upon which they were allowed to enter this country has ceased to exist and they are required to return home. This is not punishment, but merely carrying out the understanding to which they agreed when they were allowed to enter the United States. If the illegal Iranian non-immigrants who are the principal focus of this Regulation are still referred to as *students*, even though they do not attend classes, then the term student is being misused.[2]

---

[2] In reply to the amicus brief it should merely be added that it places too much reliance on dissenting opinions. It also incorrectly assumes that non-immigrant aliens who are illegally in the country have some right to remain here without being subject to due process deportation hearings, which is all the subject regulation requires them to face.

The assertion that the presence of subject illegal aliens does not "in some way [constitute] a clear and present danger to the welfare of the United States or its citizens" is controverted by the ruling of this court on November 19, 1979, in No. 79-2359; *Jack alone v. Andrus*, "that a demonstration at Lafayette Park has an unacceptble potential for danger to the hostages now being held in the American Embassy in Tehran." Their allegiance to their mother country implicitly creates

(Cont'd.)

In closing I wish to state that because of the authorities I have set forth previously, I disagree with the dissent which suggests that the President's action should be subjected to further "close scrutiny." In the circumstances this is tantamount to seriously questioning the President's action. It should be pointed out, however, that the question has already received full consideration and more than sufficient time has passed to give the questions full consideration. It is also incorrect to say "that the President has taken this action without express authorization of Congress." (Dissent, n. 4). In the situation with which we are here dealing, the President's power is at its zenith — right up to the brink of war and he does act pursuant to the "express authorization" of Congress. The relevant statute provides that whenever "any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government. . .if [their] release is unreasonably delayed or refused, the President *shall* use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release. . .". This expressly covers the holding of United States citizens as hostages.

The foregoing Presidential authority has been in existence since the Act of July 27, 1868, R.S. 2001, 15 Stat. 224 which presently appears as Title 22, U.S.C. §1732. In its entirety it provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of

---

[2] (Cont'd.)
such hazard. Notice can also be taken of other instances elsewhere in the country where aliens with such allegiance have resorted to mob action in support of the policies being presently carried on in their mother country. Federal Rules of Evidence, Rule 201(b).

> American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

This direction to the President by Congress is unequivocal. It completely supports every act and order that he has taken to free the United States hostages. No further scrutiny of his acts is required or necessary.

I therefore vote to deny rehearing.

Joint Statement of Chief Judge Wright and of Circuit Judges Robinson, Wald and Mikva Setting Forth Their Reasons for Voting to Rehear these Cases *En Banc.*

Under challenge in these cases is an *executive decision* to enforce an immigration statute selectively against a group of aliens because of the conduct of their parent country, thus affecting them solely on the basis of their nationality.[1] Such selective law enforcement poses a novel and serious question implicating an equal protection component of Fifth Amendment due process.[2] Because we believe the question is of exceptional importance,[3] we have voted in favor of *en banc* reconsideration.

There can be no doubt but that Congress has broad authority,[4] which it may vest in the Executive, to limit immigration on a variety of bases, including nationality.[5] But once an alien has taken up residence in the United States, even temporarily, he or she derives substantial protection from the Constitution and laws of this land.[6] It may be that the President, in these troubled days, has the power to decide that our deep aversion to selective law enforcement against a group solely on the basis of their country of origin must give way to some other imperative.[7] The Supreme Court has certainly suggested that Congress has that power.[8] Nevertheless, the question requires close scrutiny, and our answer must reflect careful consideration of "fine, and often difficult, questions of values."[9]

We presently have no settled opinion on the propriety of the action attacked here. These cases do, however, raise a grave constitutional issue. When the rule of law is being compromised by expediency in many places in the world, it is crucial for our courts to make certain that the United States does not retaliate in kind. We think rehearing by the full court is appropriate and necessary.

---

[1] *Narenji v. Civilleti*, No. 79-2460 (D.C. Cir. Dec. 27, 1979), at 2-3.

[2] See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[3] Rehearing *en banc* "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). There is no serious claim of decisional conflict within the circuit.

[4] The fact that the President has taken this action without express authorization from Congress is a significant factor in the Constitutional balance. Even the cases upholding the right of the Executive, acting pursuant to congressional authorization, to exercise virtually unfettered discretion in expelling "undesirable" aliens from the United States have approved expulsion only upon a specific claim that the alien has acted in a manner contrary to the interests of the United States. See, *e.g.*, *Shaughnessy v. Mezei*, 345 U.S. 206 (1953). By way of contrast, in *Kent v. Dulles*, 357 U.S. 116 (1958), the Court refused to sanction the withholding of a passport — a power usually deemed discretionary — absent a state of war or a showing that the individual denied the passport was actually engaged in illegal conduct.

[5] As the Court stated in *Yamataya v. Fisher* (The Japanese Immigrant case), 189 U.S. 86, 97 (1903):

> That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court.

[6] Thus the Court has said that immigration statutes may have "the effect of precluding judicial intervention in deportation cases *except insofar as. . .required by the Constitution*. *Heikkila v. Barber*, 345 U.S. 229, 234-235 (1953) (emphasis added). The Court recently observed that the cases "generally reflect a close scrutiny of restraints imposed by States on aliens," and that although "we have never suggested that such legislation is inherently invalid, . . .the Court has treated certain restrictions on aliens with 'heightened solicitude,'. . .a treatment deemed necessary since aliens. . .have no direct voice in the political process." *Foley v. Connelie*, 435 U.S. 291, 294 (1978). The Court has reminded us that in the immigration field, as elsewhere, "[i]t is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

[7] In *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Court upheld a curfew for citizens of Japanese descent but cautioned:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose

(Cont'd.)

[7] Cont'd.)

> institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . *We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.*

Id. at 100 (emphasis added). In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court emphasized that "[n]othing short of apprehension by the proper military authorities of the *gravest imminent danger to the public safety* can constitutionally justify" such restrictions. *Id.* at 218 (emphasis added). And see Ex parte Endo, 323 U.S. 283 (1944).

[8] In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) the Supreme Court discussed the ambiguity of the position of aliens, pointing out that the alien brings with him

> a foreign call on his loyalties which international law not only permits our government to recognize but commands it to respect. . . . Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

[9] *Foley v. Connelie*, 435 U.S. 291, 244 (1978) (upholding New York State's exclusion of aliens from the police force).

APPENDIX D

PART 214--NONIMMIGRANT CLASSES

§214.5 Requirements for maintenance of status for nonimmigrant students from Iran.

(a) An alien admitted as an F-1 or J-1 nonimmigrant student to attend a post-secondary school, including a vocational school, who is a native or citizen of Iran must report to the INS District Office or suboffice having jurisdiction over his or her school or to an INS representative on campus before December 14, 1979, and provide information as to residence and maintenance of nonimmigrant status. Each student must have in his or her possession at the time of reporting:

(1) Passport and Form I-94;

(2) Evidence from the school of enrollment and payment of fees or waiver of payment of fees for the current semester;

(3) A letter from school authorities attesting to the course hours in which presently enrolled and the fact that the student is in good standing; and

(4) Evidence of current address in the United States. Students must provide such other information as INS may request in order to verify maintenance of status and residence.

(b) Failure by a nonimmigrant student to comply with the provisions of paragraph (a) of this section or willful provision of false information to the INS will be considered a violation of the conditions of the nonimmigrant's stay in the United States and will subject him or her to deportation proceedings under Section 241(a)(9) of the Act.

(c) A condition of the admission and continued stay in the United States of a nonimmigrant covered by paragraph (a) of this section is obedience to all laws of United States jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may be imposed, (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status under Section 241(a)(9) of the Act.

The foregoing actions are taken in accordance with the Presidential directive of November 10, 1979, issued in the course of, and in response to, the international crisis created by the unlawful detention of American citizens in the American Embassy in Tehran. Accordingly, the notice and comment and delayed effective date provisions of Section 553 of Title 5 of the United States Code are hereby waived as impracticable and contrary to the public interest.

Effective date. The amendments contained in this order become effective on November 13, 1979.

Dated: November 13, 1979

Benjamin R. Civiletti,
Attorney General of the United States.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. C 79-0623-L (A)

RAFFIK ABNOUS, ET AL. PLAINTIFFS

vs.

BENJAMIN R. CIVILETTI DEFENDANT

AGREEMENT

The parties, by counsel, hereby agree as follows:

The plaintiffs agree to the Court's granting the motion of the United States for dissolution of the temporary restraining order issued by the Court herein on December 4, 1979.

As to each person in the plaintiff class against whom the Office of the District Director of the Immigration and Naturalization Service in New Orleans, Louisiana, has issued an Order to Show Cause, in the interest of taking special steps to insure fairness and equity under the circumstances of the Iranian situation, the United States agrees that the Office of District Director at New Orleans shall review the discretion exercised by it in issuing the subject orders to show cause. The Office of District Director shall, in reviewing its decision, cancel any proceedings which upon further consideration merit cancelling under the provisions of 8 C.F.R. §242.7

The parties further agree that this action should be held in abeyance pending said review and that the defendant

United States not be required to answer or otherwise respond to the complaint except upon reasonable notice by plaintiffs.

Dated this 11th day of January, 1980.

ALBERT JONES
United States Attorney

Michael R. Tilley
Assistant U.S. Attorney
211 U.S. Courthouse Building
Louisville, Kentucky 40202
Phone: (502) 582-5938

David J. Anderson
Elizabeth Gere Whitaker
Brook Hedge
Attorneys, Dept. of Justice
Civil Division
Federal Programs Branch
10th St. & Constitution Ave., NW
Washington, DC 20530

Paul Soreff
ALLISON, SOREFF & GARBER
3208 West Broadway
Louisville, Kentucky 40211

Barbara Wolkowitz
Legal Aid Society of
Louisville, Inc.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202

Oliver Barber
312 Marion E. Taylor Building
Louisville, Kentucky 40202

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. C 79-0623-L(A)

RAFFIK ABNOUS, ET AL. PLAINTIFFS

vs.

BENJAMIN R. CIVILETTI DEFENDANT

ORDER

An agreement between the parties having been filed whereby plaintiffs agreed to a dissolution of the temporary restraining order; the defendant agreed to a review of all individual cases in which Orders to Show Cause have been issued; and both parties having agreed that this action be held in abeyance pending said review and until further notice,

IT IS HEREBY ORDERED that the temporary restraining order issued herein on December 4, 1979, is dissolved and the plaintiffs exonerated from their bond.

It is further ordered that this action be held in abeyance pending further orders of the Court.

Dated this 11 day of January, 1980.

JUDGE, UNITED STATES DISTRICT COURT

Copy to:
United States Attorney
Counsel of Record

ENTERED
JAN 11, 1980
JESSE W. GRIDER, CLERK
BY DEPUTY CLERK